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The NPRM in WT Docket No. 95-157 Contains Adequate Notice for the Commission to Alter the Rules for the Voluntary Microwave Relocation Period

Questions have arisen regarding the ability of the Commission to alter its rules for the voluntary microwave relocation period in response to the Notice of Proposed Rulemaking in WT Docket No. 95-157. As demonstrated below, when judged against the applicable requirements, the FCC's notice clearly preserved the Commission's legal flexibility to change the relocation rules.

The Legal Requirement.

The APA requires an agency to provide "[g]eneral notice" which discloses "either the terms or substance of the proposed rule or a description of the subjects and issues involved". 5 U.S.C. § 553(b). In addition, courts have consistently found the notice provision to have been met where parties "should have anticipated that such a [rule change] might be imposed" and where a new round of comment would not offer parties "their first occasion to offer new and different criticism which the agency might find convincing". *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979) (procedural rules "meant to ensure meaningful public participation . . . not to be a straitjacket for agencies"), *cert. denied* 453 U.S. 913 (1981).

The Notice.

The NPRM in 95-157 stated that the Commission believed that "the general approach to relocation in our existing rules is sound and equitable" (§ 3) but "note[d] that the U.S. House of Representatives has recommended that the voluntary negotiation period. . . be shortened from two years to one year" (n. 2 (citation omitted)). The NPRM also stated its belief that "the time for expansive negotiation is during the voluntary period" and specifically sought "comment on our proposal" (§ 69).¹ Additionally, the Commission urged "public safety licensees to relocate as soon as possible" and stated that the FCC did not "intend for public agencies to delay deployment of PCS services if at all avoidable."

¹ The NPRM proceeded to describe the existing rules in some detail (§ 6) and made tentative conclusions regarding premium payments made during the voluntary period (§ 37).

Record Comment.

Not surprisingly, this discussion in the Notice elicited substantial record comment -- on both sides of the issue -- regarding possible changes in the voluntary rules. In fact, even a cursory review of the record shows that nearly 40 per cent (23 out of 59) of the parties participating in the proceeding commented on the Commission's conclusions about the voluntary rules. For example:

- ▶ The Sprint Telecommunications Venture urged the FCC to collapse the voluntary and mandatory negotiation periods into one "good faith negotiation period" in order to eliminate the perverse incentives built into the voluntary negotiation period.

- ▶ PCIA suggested that the Commission replace the voluntary negotiation period with a one-year mandatory negotiation period -- comments that were echoed by UTAM.

- ▶ PCS PrimeCo. likewise urged the FCC to reassess the voluntary period because of a record of consistent microwave incumbent abuses.

- ▶ AT&T Wireless Services also argued that the Commission should try to eliminate bad faith negotiations by reducing the voluntary negotiation period to one year.

Similar comments were filed by the Wireless Telephone Company of America, CTIA and Omnipoint, among others. Not surprisingly, there was also a substantial amount of comment from microwave incumbents asking the Commission not to change its existing voluntary rules:

- ▶ The American Public Power Association urged the Commission to reject any attempts to change the voluntary negotiation rules.

- ▶ The Association of American Railroads disputed the record of negotiation abuse and asked that the Commission not alter the voluntary negotiation period.

- ▶ UTC likewise argued that the FCC should leave the voluntary negotiation rules in place.

Similar comments were filed by Southern California Gas Company, Brazos Electric Cooperative and Colorado Spring Utilities, among others.

Adequacy of the Notice.

For APA purposes, the notice given by the Commission in the NPRM was clearly adequate to support changes in the FCC's voluntary negotiation rules. As indicated above, while the Commission expressed satisfaction with its "general approach," the agency also indicated that others held a different view. The FCC also specifically asked for comment on its "proposal" -- including its belief that "the time for expansive negotiation is during the voluntary period and that, by the time the parties have reached the mandatory negotiation period, only the bare essentials should be required." And the Commission also recognized the need for swift relocation of incumbent microwave licensees. Accordingly, the Commission's voluntary rules and the effect of those rules were expressly put at issue.

This fact was clearly understood by the parties, which disputed both the record of negotiation abuses and the need to change the voluntary negotiation rules. As courts have consistently found, comments from numerous parties on a given issue is evidence that adequate notice was given. *E.g., Edison Electric Institute v. EPA*, 2 F.3d 438, 450 (D.C.Cir. 1993). The APA simply does not require that "interested parties be provided precise notice of each aspect of the regulations eventually adopted". *Forester v. CPSC*, 559 F.2d 774, 787 (D.C.Cir. 1977). To the contrary, notice is "sufficient" for APA purposes "if it affords interested parties a reasonable opportunity to participate in the rulemaking process." *Id.* Clearly the parties had such notice in this proceeding and took advantage of it.

In fact, to require more of the FCC would unnecessarily hamstring the agency's work and be inconsistent with the purpose of the APA. The essence of notice and comment rulemaking is to allow agencies to receive comments on its conclusions or tentative conclusions. Based on the record comments, agencies may adopt, alter or reject their conclusions. Otherwise, as courts have found, agencies "can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n. 51 (D.C.Cir. 1973).